

*In re: Matterhorn Group, Inc.*  
Case No. 10-39672 (MSM)  
United States Bankruptcy Court –Eastern District of California  
(Sacramento Division)

**EXHIBIT 3**  
**TO DECLARATION OF**  
**EMILY P. RICH**  
**IN SUPPORT OF UNIONS' JOINT**  
**MOTION TO WITHDRAW THE**  
**REFERENCE OF DEBTORS'**  
**MOTION TO MODIFY OR REJECT**  
**COLLECTIVE BARGAINING**  
**AGREEMENTS**  
  
**WITH**  
**THE BAKERY, CONFECTIONERY, TOBACCO**  
**WORKERS AND GRAIN MILLERS' LOCAL NO. 85**  
**AND TEAMSTERS LOCAL 324**

**32 PAGES**

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
(SACRAMENTO DIVISION)

In re	)	Lead Case No.	10-39672 (MSM)
MATTERHORN GROUP, INC.,	)	(Jointly Administered with Nos. 10-39664	
Debtor.	)	(MSM) and 10-39670 (MSM)	
	)	DC No.	LNB-17
VITAFREZE FROZEN	)	Chapter 11 Case	
CONFECTIONS, INC.,	)	<b>MEMORANDUM OF POINTS AND</b>	
Debtor.	)	<b>AUTHORITIES IN SUPPORT OF</b>	
	)	<b>THE BAKERY, CONFECTIONERY,</b>	
	)	<b>TOBACCO WORKERS AND GRAIN</b>	
	)	<b>MILLERS' INTERNATIONAL</b>	
	)	<b>UNION LOCAL NO. 85 AND</b>	
	)	<b>TEAMSTERS LOCAL 324's JOINT</b>	
	)	<b>OPPOSITION TO DEBTORS'</b>	
	)	<b>MOTION TO MODIFY OR REJECT</b>	
	)	<b>COLLECTIVE BARGAINING</b>	
	)	<b>AGREEMENTS</b>	
DELUXE ICE CREAM COMPANY,	)	DATE: October 25, 2010	
Debtor.	)	TIME: 9:00 a.m.	
	)	PLACE: Department A	
	)	Courtroom 28, 7th Floor	
	)	Robert T. Matsui Courthouse	
	)	501 "I" Street	
	)	Sacramento, CA 95814	
	)	Judge: Michael S. McManus	
<input checked="" type="checkbox"/> Affects All Debtors	)		
<input type="checkbox"/> Affects Only Matterhorn Groups, Inc.	)		
<input type="checkbox"/> Affects Only Vitafreze Frozen	)		
Confections, Inc.	)		
<input type="checkbox"/> Affects Only Deluxe Ice Cream Company	)		

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1 I. INTRODUCTION

2 The Debtors' Motion to Modify or Reject Collective Bargaining Agreements ("Debtors'  
3 § 1113 MPA") rests upon violations of federal labor law that preclude it from being granted.  
4 Debtors' § 1113 MPA purports to recite the grounds required by 11 U.S.C. § 1113 for modification  
5 or rejection of a collective bargaining agreement ("CBA"). The Motion's essence, however, is to  
6 seek judicial ratification of unfair labor practices, and other violations that have continued from the  
7 outset of these bankruptcy cases. The serious violations carry ruinous potential for the Debtors'  
8 estates and creditors, in addition to harming the workers and their Unions.<sup>1</sup>

9 Although far from transparent, the public record reveals enough to pull the plug on CBA  
10 rejection. In rough sequence, the Debtors filed bankruptcy petitions July 26, 2010 and proceeded  
11 as follows:

- 12 • Stopped making pension contributions under the respective multiemployer pension
- 13 plans as specified in their CBAs and obtained an estimate of \$4.4 million as its
- 14 amount of withdrawal liability for the Bakery pension fund;
- 15 • Refused to pay scheduled wage increases under the Deluxe Ice Cream CBAs;
- 16 • Failed to bring all Health contributions current, forcing losses of benefits;
- 17 • Decided to sell substantially all assets at both Vitafreze and Deluxe Ice Cream;
- 18 • Decided to seek rejection of all Union contracts by court order under § 1113.

19 The Debtors then sent extreme and hostile proposals to the Unions for modifications,  
20 including those CBA alterations it had already installed concerning pensions and scheduled pay  
21 increases. The proposals came with the threat that a CBA rejection motion would be sought on a  
22 coming certain date if agreement was not reached before then. Meanwhile the Unions' information  
23 requests went unanswered, and the Unions' requests to meet about the CBA modification proposals  
24 were ignored,<sup>2</sup> until after the Debtors' § 1113 MPA was filed. The Debtors also refused to meet

25  
26 <sup>1</sup> Bakery, Confectionery, Tobacco Workers and Grain Millers' International Union Local No. 85  
27 has a CBA covering workers at Vitafreze Frozen Confections, Inc. in Sacramento; General  
Teamsters Local 324 has two CBAs covering workers at Deluxe Ice Cream Company in Salem,  
Oregon.

28 <sup>2</sup> One short meeting respecting the Vitafreze CBA was broken off because Debtors were  
unprepared to discuss the pension and sale issues and wished to obtain labor counsel.

1 concerning their unilateral cessation of pensions and refused to bargain about their decision to sell  
2 substantially everything and the effects of that decision.<sup>3</sup>

3 The Debtors' bargaining conduct portrays the marks of a sham procedure, designed to  
4 secure rejection based on proposals for modifications it has already set in place with no bargaining  
5 at all. The Debtors will next argue that CBA rejection damages should be deemed prepetition  
6 claims, as would multi-million dollar pension withdrawal liability claims, and that a successor  
7 employer should have no responsibility to Unions, pension funds, or workers. When the successor  
8 in fact may include current owners or insiders, the bona fides of the CBA rejection fail.<sup>4</sup> Other  
9 questions remain, including about details of whether the Debtors in fact seek CBA rejection to  
10 benefit insiders who are able to direct the Debtors' actions,<sup>5</sup> poisoning good faith bargaining  
11 processes.

12 The law forbids this gambit. When an alteration of a collective bargaining agreement  
13 occurs prior to commencing § 1113 proceedings, **the alteration precludes rejection of that**  
14 **agreement**, as discussed in detail in this brief. To take away contract provisions and then insist on  
15 bargaining from that point is unfair bargaining and unlawful under the NLRA.

16 Apart from the pension and labor law violations underlying the Rejection Motion, the  
17 Debtors' failure, even facially, to carry their burden of establishing all required elements of § 1113  
18 is also set out in this brief. Before reaching those elements, however, the Rejection Motion should  
19 be rejected to protect the law and the collective bargaining process.

## 20 II. APPLICABLE LEGAL STANDARD

21 Section 1113 was enacted "in order to buffer CBAs against uncontrolled inroads whenever  
22 financial distress drives an employer into the bankruptcy courts in an effort to reorganize. *In re*

23  
24 <sup>3</sup> Unfair bargaining charges have been filed with the NLRB on behalf of each of the Unions to  
address these and other issues under the National Labor Relations Act.

25 <sup>4</sup> The sale process could be tarnished by Debtors' maneuvers, in that the sale motion seeks a  
26 finding that the sale is "Free and Clear of the Debtors' Union and Pension Liabilities," *see*  
Debtors' MPA ISO Sale at 27, with no consideration of the controlling non-bankruptcy statutes,  
the NLRA and ERISA.

27 <sup>5</sup> CEO Nathan Bell's acknowledgement of his own interest in a purchase of the Debtors' assets  
28 suggests that the Debtors' bargaining conduct could be shaped to favor CBA rejection to the  
prejudice of the estate, the creditors, the pension plans, and the Unions and their members.



1 *Continental Airlines*, 125 F.3d 120, 137 (3d Cir.1997) and *In re Roth Am., Inc.*, 975 F.2d 949, 956  
2 (3d Cir.1992), both citing *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989-90 (2d Cir.1990)).” *Am.*  
3 *Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 81- 82 (3d Cir. 1999).

4 A debtor may “reject a collective bargaining agreement only in accordance with the  
5 provisions of [Section 1113].” 11 U.S.C. §1113 (a). Subsection (b)(1) specifies that:

6 [s]ubsequent to filing a petition and prior to filing an application seeking  
7 rejection of a [CBA], the debtor . . . shall – (A) make a proposal to the  
8 authorized representative of the employees covered by such agreement,  
9 based on the most complete and reliable information available at the time of  
10 such proposal, which provides for those necessary modifications in the  
11 employees benefits and protections that are necessary to permit the  
12 reorganization of the debtor and assures that all creditors, the debtor and all  
13 of the affected parties are treated fairly and equitably; and (B) provide,  
14 subject to subsection (d)(3), the representative of the employees with such  
15 relevant information as is necessary to evaluate the proposal.

12 Subsection (b)(2) further states:

13 During the period beginning on the date of the making of a proposal  
14 provided for in paragraph (1) and ending on the date of the hearing provided  
15 for in subsection (d)(1), the [debtor] shall meet, at reasonable times, with the  
16 authorized representative to confer in good faith in attempting to reach  
17 mutually satisfactory modifications of such agreement.

16 Section 1113 subsection (c) further states:

17 The court shall approve an application for rejection of a collective  
18 bargaining agreement only if the court finds that – (1) the [debtor] has, prior  
19 to the hearing, made a proposal that fulfills the requirements of subsection  
20 (b)(1); (2) the authorized representative of the employees has refused to  
21 accept such proposal without good cause; and (3) the balance of the equities  
22 clearly favors rejection of such agreement.

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1 The above requirements are cumulative.<sup>6</sup> "Rejection of a collective bargaining agreement  
2 is prohibited absent strict compliance with the substantive and procedural requirements of the  
3 statute."<sup>7</sup> Accordingly, a debtor cannot prevail unless it meets *all* of the Section 1113 hurdles.

4 This analysis does not require a Court to make value judgments as to "whether the  
5 [debtor's] position is right and the Union's is wrong, or vice versa," nor "whether collective  
6 bargaining agreements are good or bad." *In re Bruno's Supermarkets, LLC*, No. 09- 00634-BGC-  
7 1, 2009 WL 1148369, \*18 (Bankr. N.D. Ala. Apr. 27, 2009).<sup>8</sup> On the other hand, the Unions urge  
8 the Court not to lose sight of the fact that:

9  
10 <sup>6</sup> In essence, the movant under Section 1113 must, prove by a preponderance of the evidence, the  
11 nine elements that were set out in the leading case, *In re American Provision Co.*, 44 B.R. 907, 909  
12 (Bankr. D.Minn. 1984), which is followed by virtually all courts:

13 1. The debtor must make a proposal to the union to modify the collective bargaining  
14 agreement.

15 2. The proposal must be based on the most complete and reliable information available at  
16 the time of the proposal.

17 3. The proposed modifications must be necessary to permit the reorganization of the debtor.

18 4. The proposed modifications must assure that all creditors, the debtor and all affected  
19 parties are treated fairly and equitably.

20 5. The debtor must provide to the union such relevant information as is necessary to  
21 evaluate the proposal.

22 6. Between the time of making of the proposal and the time of the hearing on approval of  
23 the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable  
24 times with the union.

25 7. At the meetings the debtor must confer in good faith in attempting to reach mutually  
26 satisfactory modifications of the collective bargaining agreement.

27 8. The union must have refused to accept the proposal without good cause.

28 9. The balance of the equities must clearly favor rejection of the collective bargaining  
agreement.

*American Provision*, 44 B.R. at 909.

<sup>7</sup> *In re Certified Air Techs., Inc.*, 300 B.R. 355, 361 (Bankr. C.D. Cal. 2003). The debtor bears the  
burden of proving *all* of the *American Provision Co.* requirements by a preponderance of the  
evidence. *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 800-801 (Bankr. W.D. Ky. 1985). If the  
debtor does not meet that burden on any one of the elements, the Court may not allow it to reject  
its collective bargaining agreements. *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr.  
D.Minn. 1984); *In re The Lady H Coal Co., Inc.*, 193 B.R. 233, 241 (Bankr. S.D. W. Va. 1996)  
("As the Court finds that the Debtors have not met elements (4), (7) and (9) above for the reasons  
set forth below, it is not necessary to address any of the other elements.").

<sup>8</sup> Although Debtors' intent is obscure, to the extent Debtors contend that they are merely seeking  
"authority to reject" and not actual rejection, such a contingent motion is not provided for in the  
statute. Section 1113(f) provides for a motion to reject, alone; no "authority to reject" or  
"contingent rejection" is available.

1 Compared to the typical claim in bankruptcy . . . wages represent a large part  
2 of an employee's wealth. In addition, unlike the ordinary trade creditor, the  
3 typical employee does not have other sources of income, and thus cannot  
4 effectively diversify the risk of the employer's default. A short period of  
5 unpaid wages, therefore, may bring immediate and severe harm to an  
6 employee and her family.

7 Furthermore, unlike sophisticated commercial creditors, most employees do  
8 not meaningfully "assume the risk" of their debtor's default. Most employees  
9 accept employment on the basis of severely limited information and have  
10 little ability to protect themselves in advance of an employer's possible  
11 default. Generally, employees are unable to assess the present or future  
12 creditworthiness of their employer, and it is often difficult for them to  
13 monitor their employer's financial condition during the course of their  
14 employment. Even if they happen to learn of an employer's financial  
15 troubles in time to act, workers may lack the mobility to change jobs.  
16 Indeed, businesses reap important benefits from the fact that many workers  
17 suffer constraints in information and mobility. If employees had full  
18 information and total mobility, they might be inclined to abandon such  
19 businesses at the earliest signs of financial distress, or based on rumor rather  
20 than fact.

21 Donald R. Korobkin, *Employee Interests in Bankruptcy*, 4 Am Bankr Inst L Rev 5, 6 (Spring  
22 1996).

## 23 I. FACTUAL BACKGROUND

24 The Bakery & Confectionery Workers Local 85 and the Debtors are parties to a Collective  
25 Bargaining Agreement ("Local 85 CBA") with a term of August 30, 2009 through August 31,  
26 2013. *See* Exhibit 1 to Debtors' § 1113 MPA.

27 The Teamsters Local 324 has two collective bargaining agreements with the Debtors for  
28 work at the Salem, Oregon plant, one of which covers the Packers and Palletizers ("Local 324  
Palletizers CBA"), and the other of which covers the operators, loaders, semi-drivers, and  
maintenance workers ("Local 324 Operators CBA"). Both the Local 324 Palletizers CBA and the  
Local 324 Operators CBA have terms of August 1, 2008 through July 31, 2010. *See* Exhibit 3 to  
Debtors' § 1113 MPA at 85; Exhibit 2 to Debtors' § 1113 MPA at 58.

Debtors have instituted at least two unilateral changes to the CBAs—changes which are  
subject to mandatory bargaining under federal law. Debtors unilaterally ceased all pension  
contributions to the Trust Funds of both Unions, covering all of the workers under the three  
Collective Bargaining Agreements. *See* Partial Transcript of 9/2/2010 Creditors' Meeting at 10,

1 attached as Exhibit A to Gottesman Decl. Debtors also failed to institute the August 1, 2010 wage  
2 increases as required by the Local 324 Operators CBA and the Local 324 Palletizers CBA. Exhibit  
3 A to Gottesman Decl. at 10; Exhibit 2 to Debtors' § 1113 MPA at 43; Exhibit 3 to Debtors' § 1113  
4 MPA at 72.

5 MGI sent a proposal to the Bakery Workers Local 85 on August 29, 2010, however, that  
6 proposal, attached to Debtors' § 1113 MPA as Exhibit 4 (without a cover page),<sup>9</sup> does not propose  
7 modifications to the *current* CBA, (which is attached to Debtors § 1113 MPA as Exhibit 1).  
8 Nonetheless, Local 85 sent a cover letter and request for information relating to the original  
9 proposal on September 27, 2010. Exhibit B to Gottesman Decl.

10 The Debtors sent proposals to the Teamsters Local 324 on September 22, 2010. Teamsters  
11 Local 324 responded on September 27 with a cover letter and an information request for  
12 information needed to evaluate the necessity of the proposals. Exhibit C to Gottesman Decl. On  
13 October 14, 2010, Debtors responded to this information request. For the Local 324 Operators  
14 CBA information request, Debtors answered some of the questions in a vague and ambiguous  
15 manner (for example, answering questions that specifically asked for financial impact without  
16 providing financial figures) and failed to answer other questions. Exhibit D to Gottesman Decl.  
17 For the Palletizers CBA information request, Debtors only responded to one question out of  
18 nineteen. (Q: Why is this change [removal] to the union security article necessary? A: To allow for  
19 all potential employees to make their own decision as to whether they want to make contributions  
20 to the union and become union members.") *Id.*

21 Both the Bakery Local 85 and the Teamsters Local 324 requested detailed information  
22 about the potential purchasers of the Debtors' assets. Exhibit E to Gottesman Decl. The Debtors  
23 did respond to the request, but did not provide any information related to potential purchasers.  
24 Exhibit I to Gottesman Decl.

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28 <sup>9</sup> It is plausible that the reason the cover page is missing is because Debtors realized they had not  
made proposals to the correct CBA, and are trying to hide this fact from the Court. On October 14,  
2010, after Debtors' § 1113 MPA was filed, Debtors sent the Bakery Workers Local 85 a proposal  
that did make modifications to the current CBA, however these modifications were different from  
their original proposal.

1 Contrary to its declarations submitted to this Court, the Debtors have not responded to the  
2 information requests related to the Local 85 CBA.

3 On September 20, the Debtors met with representatives of Local 85, but Debtors adjourned  
4 stating that they were not prepared to address certain issues, including the effect of withdrawal  
5 liability and the effect of successor obligations in the event of sale. *See* Exhibit F to Gottesman  
6 Decl. [letter of David Rosenfeld to Nathan Bell]. On Friday October 15, Debtors confirmed by  
7 special labor counsel Ron Klepetar that it would meet on October 19 with Local 324  
8 representatives and on October 21 with Local 85 representatives.

9 As a response to Debtors' ceasing to make pension contributions and failure to implement  
10 contractual wage increases, the Unions filed two Unfair Labor Practice Charges with the National  
11 Labor Relations Board. Exhibit G to Gottesman Decl.

12 The three proposals sent to the Unions included the following proposed modifications of  
13 the Agreements, among others:

14 **1. Non-economic issues**

15 **a) Bakers Local 85 CBA**

- 16 (1) Deletion of Section 1, which provides that, in part, "[t]he employer  
17 recognizes the Union as the sole bargaining agent for all such  
18 employees, excluding but not limited to all office, clerical, sales  
19 personnel, managers, guards, and supervisors as defined under the  
20 National Labor Relations Act." Exhibit 4 to Debtors' § 1113 MPA  
21 at 90. The Debtors replaced this section with the phrase "[b]ased on  
22 the employees [sic] desire to have the Union represent them,"  
23 (unconnected to any sentence), in section 2 B and repeated it again in  
24 section 2 E. *Id.*
- 25 (2) A change in wage structure to "performance based" from seniority  
26 based. Exhibit 4 to Debtors' § 1113 MPA at 95.
- 27 (3) Elimination of seniority rights. This included the ability of  
28 employees to acquire extra shifts based on whether they were

1 qualified and were the most senior employee. Exhibit 4 to Debtors'  
2 § 1113 MPA at 92.

3 (4) President's Day eliminated as a holiday. Exhibit 4 to Debtors'  
4 § 1113 MPA at 92.

5 **b) Teamsters Local 324 Palletizers CBA**

6 (1) Removal of Article 1.3 language stating that employees shall join the  
7 Union "as a condition of employment," instead leaving union  
8 membership up to each new worker. Exhibit 5 to Debtors' § 1113  
9 MPA at 123.

10 (2) Deletion of a provision which provides that a "probationary  
11 employee shall never be transferred, promoted, retained during work  
12 force reductions, or returned to work after layoff in preference over a  
13 non-probationary employee." Exhibit 5 to Debtors' § 1113 MPA at  
14 131.

15 (3) Change in wage structure from seniority based to "performance  
16 based." Exhibit 5 to Debtors' § 1113 MPA at 127.

17 (4) Elimination of Article 7.7: Distribution of Overtime and Available  
18 Weekend Work for the Plant, which eliminates the distribution of  
19 overtime shifts to the most "senior qualified employee." Exhibit 5 to  
20 Debtors' § 1113 MPA at 128.

21 **c) Teamsters Local 324 Operators CBA**

22 (1) Change in wage structure from seniority based to "performance  
23 based." Exhibit 5 to Debtors' § 1113 MPA at 149.

24 (2) Elimination of Article 7.8: Distribution of Overtime and Available  
25 Weekend Work for the Plant, which eliminates the distribution of  
26 overtime shifts to the most "senior qualified employee." Exhibit 5 to  
27 Debtors' § 1113 MPA at 151.

28 ///

1           **2.     Elimination of pension and other benefit cuts**

2           After Debtors already had ceased all pension contributions, Debtors then proposed  
3           elimination of pension contributions in all three CBAs. *Compare* Exhibit 1 to Debtors' § 1113  
4           MPA at 22-23 with Exhibit 4 to Debtors § 1113 MPA at 98-100; Exhibit 5 to Debtors § 1113 MPA  
5           at 133; Exhibit 5 to Debtors § 1113 MPA at 156.

6           Debtors proposed to reduce union health insurance contributions by 71% for Bakery  
7           Workers Local 85 members, by 70% for Teamsters Local 324 members, and eliminate health  
8           insurance completely for seasonal workers. Debtors' § 1113 MPA 8:12-15, 15: 7-17. Debtors  
9           propose to eliminate dental insurance for all three unions. *Id.* at 15:19-25.

10           **3.     Wages**

11           Debtors proposed hourly wage cuts of up to 54.8% for their union employees. Below are  
12           the proposed reductions in wage per job title:

13                   **a)     Bakers Local 85 CBA percentage reduction in hourly pay (compared to**  
14                   **wages under the current CBA):**

- 15                   (1)     Foreperson: **19.8%**  
16                   (2)     Utility Worker: **35.3%**  
17                   (3)     Juice Mixer, Operator, Sanitors: **34.4%**  
18                   (4)     Hardening: **27.2%**  
19                   (5)     Packer and Head Packer (condensed into one): **46.6%**  
20                   (6)     Maintenance Mechanic: **36.9%**

21           *Compare* Exhibit 1 to Debtors § 1113 MPA at 14 *with* Exhibit 1 to Debtors § 1113 MPA.

22                   **b)     Teamsters Local 324 Palletizers CBA percentage reduction in hourly**  
23                   **pay (compared to wages under the current CBA):**

- 24                   (1)     Packaging: **11.8%** (reduced to California minimum wage)  
25                   (2)     Palletizers: **11.8%** (reduced to California minimum wage)

26           *Compare* Exhibit 3 to Debtors § 1113 MPA at 72 *with* Exhibit 5 to Debtors § 1113 MPA at 127.

27           ///

1                   c)     **Teamsters Local 324 Operators CBA percentage reduction in hourly**  
2                             **pay, as of October 1, 2010<sup>10</sup>**

3                   (1)     Maintenance: 22.3%

4                   (2)     Operator: 46.4%

5                   (3)     Driver: 43.2%

6                   (4)     Packer: 54.8% (reduced to California minimum wage)

7     *Compare Exhibit 2 to Debtors § 1113 MPA at 43 with Exhibit 5 to Debtors § 1113 MPA at 150.*

8             Absent from these proposals was any modification to the “no-strike” provisions of all three  
9     contracts. Other than in their § 1113 Motion, the Debtors have not presented either Union with the  
10    desire to extend the no-strike provision of the CBAs. In an October 4, 2010 hearing in this case,  
11    this Court stated that:

12                   The evidence [the Debtors are] relying on for rejection needs to be in the  
13                   motion. And if there’s been further negotiations since the filing of the  
14                   motion, then something is relevant, that’s fine. I understand. But, Mr.  
15                   Raisner wants to make sure when he gets the motion he knows why you  
16                   think the contracts ought to be rejected or they ought to have the right to be  
17                   rejected. And you satisfied the conditions to the filing of that motion.

18     Exhibit H to Gottesman Decl.

19             The Unions have been and are willing to meet and negotiate with the Debtors, and are  
20     willing to make serious economic concessions with respect to their CBAs.

21             The Debtors have not provided a plan for reorganization, but have stated that they are in a  
22     “dire” financial position. However, in a Creditors’ meeting held on September, 2, 2010, Nathan  
23     Bell, under oath, stated that the Debtors had a \$3 million dollar positive EBIDTA for 2009.  
24     Exhibit A to Gottesman Decl., 2. As late as June 2010, the Debtors had a \$400,000 positive  
25     EBIDTA. *Id.* Mr. Bell further stated that the Debtors have “a very solid business with a product  
26     that’s geographically viable,” that Mr. Bell has “not seen a single indication of drop in volume

27     <sup>10</sup> The Debtors changed the job titles for this contract, so it was not possible to determine what  
28     current job titles would transition to the proposed “foreperson,” “utility,” and “hardening”  
positions.



1 from [their] customers,” and that the Debtors’ customers have “remained loyal and stuck with  
2 [them].” *Id.* at 10-11.

3 Debtors estimate that they have lost \$3 million dollars over the last 18-24 months on selling  
4 Crystal Light products, with “the greater portion of that [] in the last 12 months.” *Id.* at 3.  
5 According to Mr. Bell, “things have been done to discontinue” the Crystal Light products, thus  
6 saving at least \$1.5 million in losses per year. *Id.* at 5. The Debtors have also estimated that they  
7 have lost at least \$1.25 million/year on a variety pack product for Costco, which they also plan on  
8 discontinuing. *Id.* at 6-7.

9 Debtors’ CEO Nathan Bell has stated in negotiations with the Bakers Local 85 and in a  
10 Declaration that he and a team of investors are trying to purchase the Debtors’ assets. Decl. of Bell  
11 at ¶ 20 In Support Of Sale Motion, Filed Oct. 8, 200 [DOC # 269], attached as Exhibit J to  
12 Gottesman Decl. (“I have previously made clear to both the Bank and the Creditors’ Committee  
13 that I, working alone or in conjunction with others, may be a bidder at the auction sale.”).

### 14 III. ARGUMENT

#### 15 A. NEITHER DEBTORS’ PROPOSED MODIFICATIONS NOR REJECTION OF 16 THE CBAS IS NECESSARY TO REORGANIZATION; AFTER A SALE OF 17 DEBTORS’ ASSETS, ANY INDEPENDENT PURCHASER WILL NOT BE BOUND 18 BY THE DEBTORS’ CBAS

18 The gravamen of Debtors’ argument is that “it would be burdensome for any prospective  
19 purchaser to buy the Debtors’ assets including the over-market obligations required by the  
20 Collective Bargaining Agreement.” Debtors’ § 1113 MPA at 9:11-14. Because the Debtors will  
21 auction their assets on November 1, 2010, Debtors argue that the Court should grant their § 1113  
22 motion because any prospective purchaser would find the obligations under the CBAs  
23 “burdensome”—and this burden will reduce the potential sale price. The Debtors are misleading  
24 this Court.

25 Under federal labor law, an employer **cannot be bound to the substantive terms of the**  
26 **CBA between the predecessor employer and the union** unless the successor has agreed to or  
27 assumed the substantive terms of the CBA. *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272  
28 (1972). Here, there has been no indication that a prospective purchaser would agree to assume the

1 CBAs (at all or in any modified form), nor any indication that the Debtors have requested a  
2 prospective purchaser to do so. Thus, the Court's ruling on the Debtor's § 1113 MPA in this  
3 matter is of no legal consequence to the issue of whether any prospective purchaser is at risk of  
4 having the CBAs imposed on it. There is no "burden" holding down the price of the assets.  
5 Therefore, this Court's modification or rejection of the CBAs cannot logically be deemed  
6 "necessary" for the sale of Debtors' assets.

7 In *Burns*, the union filed an unfair labor practice charge against a successor employer,  
8 seeking, *inter alia*, an order requiring it to honor the CBA between the union and the predecessor  
9 employer. The Supreme Court held that a successor employer would not be bound to the  
10 substantive terms of the CBA between the predecessor employer and the union unless the  
11 successor had agreed to or assumed the substantive terms of the CBA because it would violate a  
12 provision of the National Labor Relations Act if the NLRB were to enforce the substantive terms  
13 of a collective bargaining agreement against a party who had not agreed to its terms, and also  
14 because such a rule would "inhibit the free flow of capital." Later, in *Fall River Dyeing &*  
15 *Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court upheld the NLRB's application  
16 of the *Burns* successorship doctrine to an employer who had purchased the assets of a bankrupt and  
17 liquidated predecessor.

18 Because there is no risk to the purchaser of succeeding to the buyer's position vis-à-vis a  
19 CBA, nor to the seller's liability for post-sale conduct vis-à-vis the CBA, bankruptcy courts have  
20 approved asset sales to purchasers without having first approved a § 1113 rejection of a CBA. *See,*  
21 *e.g., In re Family Snacks, Inc.*, 257 B.R. 884, 898 (B.A.P. 8th Cir. 2001) (the buyer of the debtor's  
22 assets explicitly refused to assume any liabilities under an existing collective bargaining agreement  
23 between the debtor and the employees' union; the court held that the debtor "was not required to  
24 reject the CBA prior to or in conjunction with the asset sale under § 1113").<sup>11</sup>

25  
26 <sup>11</sup> In *In re The Lady H Coal Co., Inc.*, *supra*, 193 B.R. at 243, the court elaborated upon the same  
27 rule: "Even though the Court found it not proper to permit rejection of the CBA, it does not follow  
28 that the Court is required or permitted to deny the Debtors' motion to sell.... The Court believes  
that sales under § 363(b) provide protection to objecting parties as such objections or claims may  
attach to the proceeds of such sale. Employee creditors are protected by the right to file claims for  
breach of the [CBA] with such damages to be satisfied by payments from the proceeds of sale."

1 ///

2 Finally, regardless of whether the bankruptcy court authorizes a sale “free and clear” of any  
3 CBA’s provisions, the NLRB still will retain exclusive jurisdiction to determine the buyer’s  
4 obligations to recognize and bargain with the unions representing the bankrupt company’s  
5 employees. *See, NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 802 (1st Cir. 1995) (holding that the  
6 NLRB and not the bankruptcy court has jurisdiction to decide whether an entity that purchased  
7 assets out of bankruptcy must bargain with the predecessor’s union).

8 The Debtors have recently hired labor counsel, who should be aware of the applicable  
9 federal labor law here. Given that a sale of assets is forthcoming and the lack of impact the CBAs  
10 should have on the purchase price, it is unclear why Debtors wish to modify or reject the CBAs.<sup>12</sup>  
11 Debtors’ CEO Nathan Bell has stated both in a meeting with the Bakery Local 85 and in a  
12 Declaration that he and a team of investors are trying to purchase the Debtors’ assets. Ex. I to  
13 Gottesman Decl at ¶ 20. This may provide a clue as to why this motion was made. If a purchaser  
14 is found to be an *alter ego* of the former employer, for example, the purchaser may be determined  
15 to be bound by the former owner’s CBA. It is possible that Mr. Bell is anticipating that his  
16 investment group may be sufficiently affiliated with the Debtors to meet the *alter ego* standard and  
17 ultimately be bound to the CBAs. If this is the case, he should be candid with the Court and the  
18 Unions about this possibility and not make generally incorrect statements about the CBAs’  
19 “burden” for “any prospective purchaser.”

20 Here, the Debtors’ perceived need is an *element of proof* on which it bears the burden by a  
21 preponderance of evidence. The Debtors’ alleged “necessity” is that a prospective purchaser may  
22 find the Debtors’ assets more attractive if the CBAs are rejected. The problem with the Debtors’  
23 logic is that it is not necessary to reject the CBAs; a *bona fide* successor will not be bound by them.  
24 It is beyond cavil that the Debtors cannot meet their burden to prove “necessity.” Therefore, the  
25

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26 <sup>12</sup> The Debtors argue, despite the November 1 sale date fixed by the Court, that rejection is “critical  
27 to permitting Debtors’ reorganization, whether there is a sale of Debtors’ assets, and particularly if  
28 there is not a sale.” Debtors’ § 1113 MPA at 3:7-8. Yet Debtors argue that the only alternative to  
a sale is liquidation. Debtors have yet to explain why modification or rejection is crucial to  
liquidation.

1 Court must deny this § 1113 Motion.

2 **B. DEBTORS HAVE UNILATERALLY ALTERED PROVISIONS OF ALL THREE**  
3 **CBAS IN CLEAR VIOLATION OF § 1113(f), THIS PRECLUDES REJECTION OF**  
4 **ANY OF THE CBAS**

5 Prior to initiating any § 1113 proceedings, Debtors unilaterally altered provisions of all  
6 three CBAs, which, as a matter of law, precludes rejection of any agreement. The Debtors altered  
7 Article 17 of the Local 85 CBA, Article 15 of the Local 324 Palletizers CBA, and Article 15 of the  
8 Teamsters Operators CBA, in their entirety, by ceasing to make pension contributions to the  
9 respective Pension Funds. *See* Exhibit A to Gottesman Decl. at 10. Further, the Debtors failed to  
10 institute the contractually obligated wage increases of Article 6 of the 324 Palletizers CBA, and  
11 Article 6 of the Teamsters Operators CBA. *Id.* Because these unilateral alterations of sections of  
12 the CBAs violate § 1113 (f) and occurred prior to commencement of § 1113 proceedings, the  
13 Debtors are precluded from obtaining rejection of the three CBAs.

14 Section 1113(f) provides that “[n]o provision of this title [11 U.S.C. §§ 101 et seq.] shall be  
15 construed to permit a trustee to unilaterally terminate or alter any provisions of a collective  
16 bargaining agreement prior to compliance with the provisions of this section.”<sup>13</sup> A breach of a  
17 collective bargaining agreement constitutes an alteration of that agreement. *See In re Armstrong*  
18 *Store Fixtures Corp.*, 135 B.R. 18, 21 (Bankr. W.D. Pa. 1992) (Despite debtors’ claims that their  
19 failure to pay the contractual wages and benefits under the CBAs was a “mere breach” rather than  
20 an “alteration,” “[d]ebtors effected a unilateral alteration of the agreements, for purposes of  
21 § 1113(f), when they failed to abide by the provisions pertaining to payment of wages and  
22 benefits”); *Birmingham Musicians’ Protective Ass’n, Local 256-733 v. Ala. Symphony Ass’n (in Re*  
23 *Ala. Symphony Ass’n)*, 211 B.R. 65, 69 (N.D. Ala. 1996) (“this court finds persuasive the line of  
24 cases holding that a breach [] of the CBA is a violation of § 1113(f).”).

25 When an alteration of a collective bargaining agreement occurs prior to commencing

26 <sup>13</sup> Section 1113(f) applies to debtors in possession as well as to trustees. *See In re Moline Corp.*,  
27 144 B.R. 75, 79 n.1 (Bankr. N.D. Ill. 1992) (“Section 1113(f) could be read literally to only bar a  
28 Chapter 11 trustee from unilaterally altering or terminating the provisions of a collective  
bargaining agreement. Such a reading in theory would allow a debtor in possession to unilaterally  
alter or terminate a collective bargaining agreement any way it saw fit . . . Such a result is  
ridiculous...”); *Birmingham Musicians’ Protective Ass’n, Local 256-733 v. Alabama Symphony*  
*Ass’n (“Birmingham Musicians”)*, 211 B.R. 65, 70 n.7 (N.D. Ala. 1996).

1 § 1113 proceedings, this alteration precludes rejection of that agreement. *Birmingham*  
2 *Musicians*, 211 B.R. at 69 (“allowing a rejection of the CBA is improper when the debtor has  
3 unilaterally ceased performing its obligations under the CBA prior to seeking court permission to  
4 modify or reject the CBA.”).

5 *In re GCI, Inc.* involved a debtor who impermissibly “jumped the gun” by implementing its  
6 proposal for relief from contractual layoff before concluding negotiations. Rejecting the debtor’s  
7 “advice of counsel” excuse, the court denied the Section 1113 motion, adjudging the debtor to have  
8 failed to “confer in good faith,” which the court defined as “conduct indicating an honest purpose  
9 to arrive at an agreement as the result of the bargaining process.” *In re GCI, Inc.*, 131 B.R. 685,  
10 695 (Bankr. N.D.Ind. 1991). The court went on to explain:

11 When a debtor seeks protection from creditors, it is constrained to observe  
12 the letter and the spirit of such orders granting it protection and allowing it  
13 to operate until it seeks and obtains modification of such orders. *In re*  
14 *Prime, Inc.*, 26 B.R. 556, 560 (Bankr.W.D.Mo.1983). The debtor failed to  
15 do so. Instead, it apparently elected to implement changes to the contract  
16 which were the subject of its proposal in the midst of the negotiating  
process. In doing so, it violated the explicit commandment of § 1113(f).  
When a debtor fails to abide by the restrictions which condition and limit its  
access to bankruptcy relief, it is hardly in a position to make a good faith  
plea for the court to exercise those powers in its favor. The court cannot  
find that debtor negotiated with the union in good faith.

17 *Id.*; see also *Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 81- 82 (3d  
18 Cir. 1999) (“[W]e hold that when as here a debtor in possession . . . binds itself contractually to  
19 obtain a change in the legal relations created by a CBA as a condition precedent to closing a sale of  
20 substantially all of the debtor's assets, that constitutes an attempt to effect an alteration of the CBA.  
21 . . . [H]ere Anchor and Purchaser have sought to misuse the Code in an effort to avoid the  
22 collective bargaining process that Congress deemed essential to the balance between labor and  
23 reorganizing debtors that it struck in Section 1113.”)

24 In *Birmingham Musicians*, the District Court reversed the Bankruptcy Court’s decision  
25 granting a rejection of the Debtor’s collective bargaining agreement with the Union. There, prior  
26 to initiating § 1113 proceedings, the Debtor first unilaterally cut the wages of the union members,  
27 and then petitioned the Court for rejection. *Birmingham Musicians*, 211 B.R. at 69. In reversing  
28 the Bankruptcy Court’s decision granting the debtor’s motion to reject, the Court found that, as a

1 matter of law, it could not grant a rejection motion, when, independent of the § 1113 proceedings,  
2 the debtor unilaterally altered the agreement, violating § 1113(f). *Id.*

3 Here, the situation is identical to that in *Birmingham Musicians*. Prior to putting forth any  
4 proposals to the Unions or even notifying the Unions that they wished to alter the CBAs, the  
5 Debtors unilaterally implemented modifications: the Debtors ceased all pension contributions for  
6 all workers covered under the three CBAs, and failed to institute contractual wage increases as  
7 provided for in the Teamsters Local 324 CBAs.<sup>14</sup>

8 This Court should not reward the Debtors for modifying the agreements *first*, and then  
9 asking the Court for modification or rejection *later*. “If a debtor is free to breach the CBA without  
10 impairing its ability to reject the contract later, then § 1113 provides no incentive to abide by the  
11 terms of the CBA in the interim.” *Birmingham Musicians*, 211 B.R. at 70. This Court must reject  
12 the Debtors’ motion to reject all of the agreements.

13 **C. THE COLLECTIVE BARGAINING AGREEMENTS MUST BE ANALYZED**  
14 **INDIVIDUALLY TO DETERMINE WHETHER DEBTORS HAVE MET THEIR**  
15 **REQUIREMENTS UNDER § 1113**

16 Debtors request that this Court reject all three CBAs with one motion despite § 1113’s  
17 requirements that Debtors prove each element of § 1113 *for each agreement*. See 11 U.S.C. §1113  
18 (a), (b), (c) (all referring to “a collective bargaining agreement” in the singular).<sup>15</sup> Debtors’  
19 attempt to reject all three CBAs with one motion is improper, because the Debtors have not even  
20 attempted to meet all of § 1113’s requirements for each agreement.

21 In order to determine (1) whether the terms of *the* proposal are “necessary to permit the  
22 reorganization of the debtor;” (2) whether the proposed modifications “assure that all creditors, the  
23 debtor and all affected parties are treated fairly and equitably;” (3) whether the debtor provided  
24 “such relevant information as is necessary to evaluate the proposal;” (4) whether the debtors

25 <sup>14</sup> See Exhibit A to Gottesman Decl. at 10 (“Bell: We have opted to not institute a pay increase in  
26 Salem as per the collective bargaining agreement. I think it’s \$25.47 per hour or so; but was to  
27 kick in August 1. We have not instituted that . . . we have stopped pension contributions as  
28 referred to Unions’ contract, that was a \$14,400 weekly number and we’re not making those  
contributions as we speak.”)

<sup>15</sup> To the extent that Debtors ask the Court to “modify” the bargaining agreements, this too is  
precluded, as the Debtors have neither requested interim modification under § 1113(e) nor have  
they followed the requirements under subsection (e) to obtain such modification. See below.

1 conferred "in good faith in attempting to reach mutually satisfactory modifications;" (5) whether  
2 the unions "have refused to accept the proposal without good cause;" and (6) whether the balance  
3 of the equities" favors rejection, *American Provision*, 44 B.R. at 909, the Court must analyze the  
4 *individual* proposals and actions associated therewith. Here the Debtors lump all three proposals  
5 together, lump their justifications for the necessity of the modifications, and lump their arguments  
6 for meeting each element of § 1113, making it impossible for the Unions and this Court to  
7 determine which arguments relate to each separate proposal. The aggregation of their arguments,  
8 and of their assertions regarding the financial effects of the CBAs' provisions, is seriously  
9 prejudicial to the Unions' ability to respond.

10 "Rejection of a collective bargaining agreement is prohibited absent strict compliance with  
11 the substantive and procedural requirements of the statute." *In re Certified Air Techs., Inc.*, 300  
12 B.R. 355, 361 (Bankr. C.D. Cal. 2003). Where the Debtors have ignored the defects of its motion,  
13 the Court lacks power to cure them.

14 Section 1113 was enacted to override *Bildisco* and set more rigorous  
15 standards in chapter 11 cases for the rejection of collective bargaining  
agreements than for other executory contracts or leases.

16 *In re Certified Air Techs., Inc.*, 300 B.R. at 366, citing *In re Moline Corp.*, 144 B.R. 75, 78 (Bankr.  
17 N.D. Ill. 1992). For this reason alone, the Court should deny Debtors' motion.

18 **D. THE COURT MUST DENY THE DEBTORS' MOTION TO REJECT WHERE, AS**  
19 **HERE, THE DEBTORS HAVE NOT MET THEIR BURDEN OF PROOF ON EACH**  
**AND EVERY ONE OF THE NINE § 1113 REQUIREMENTS**

20 As explained above, the Debtors cannot prevail here unless they meet *all* of the Section  
21 1113 hurdles. *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 800-801 (Bankr. W.D. Kentucky  
22 1985). In other words, if the Court finds that the Debtor has not proven *one* of the elements by a  
23 preponderance of the evidence, the motion must be dismissed. *In re The Lady H Coal Co., Inc.*,  
24 *supra*, 193 B.R. at 241; *In re American Provision Co.*, 44 B.R. at 909.

25 **1. Debtors do not meet the § 1113 standard because they failed to provide**  
26 **proposals to the Unions that modified the current CBAs**

27 In order to meet the requirements of § 1113, Debtors "must make a proposal to the union to  
28 modify the collective bargaining agreement." *In re American Provision Co.*, 44 B.R. at 909. Here

1 the Debtors did not send a proposal to the Bakery Workers Local 85 modifying the current  
2 collective bargaining agreement before filing its § 1113 motion. Debtors sent a proposal to  
3 Local 85 on August 29, 2010, however, that proposal, attached to Debtors' § 1113 MPA as Exhibit  
4 4 (without a cover page), does not propose modifications to the *current* CBA, (attached to Debtors'  
5 § 1113 MPA as Exhibit 1).

6 Further, Debtors' proposals omitted one of Debtors' main proposed modifications, the  
7 extension of the No Strike provisions of all three CBAs until 2020. Thus, Debtors have not met  
8 their requirement under § 1113 to make proposals which modifies the CBAs.

9 **2. Debtors have not shown that their proposals were based on the most complete**  
10 **and reliable information available at the time**

11 Debtors have not made an adequate showing that they based their proposals on complete  
12 and current information. Despite their claim of "transparency," the information they claim to have  
13 provided is simply the pleadings and a budget *that they did not provide to the Unions*. Debtors'  
14 § 1113 MPA at 20:18-19 (budget was delivered to the Bank and the Creditors' Committee).  
15 *Information*, for purposes of this requirement, is not simply statements about "the dire nature of the  
16 Debtors' financial condition." *Id.* at 24-25. The Unions have never received, and the Debtors have  
17 not presented to this Court, the "historical reality of operational economics . . . and a thorough  
18 analysis of all of the incidents of income and expense that would bear on its ability to maintain a  
19 going concern in the future." *See, In re Karykeion*, 2010 WL 3297029\* 12 (Bankr. C.D.Cal.  
20 2010). While the Unions have been informed that the Debtors' lender is refusing to continue their  
21 use of any cash collateral beyond mid-November 2010, this does not necessarily bear on the  
22 necessity of rejecting the CBAs—it is the Debtors' burden to connect these dots—and they have  
23 not.

24 **3. The Court must deny the § 1113 Motion because Debtors have not established**  
25 **that the modifications Debtors proposed are necessary for reorganization**

26 The plain language of § 1113(b)(1)(A) requires that the Debtors propose modifications that  
27 are "necessary to permit the reorganization of the debtor."

28 For a proposal to satisfy § 1113(b)(1)(A), it must propose modifications to  
the existing labor contract without which the debtor cannot obtain



1 confirmation . . . The court must also consider whether the employer,  
2 although needing some modifications to successfully reorganize, has sought  
3 changes to the contract which materially exceed such needs. The result of  
such overreaching is that rejection will be prohibited.

4 *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639, 646-47 (Bankr. N.D.Iowa 1991).

5 Here, the Debtors have not even attempted to justify most of the modifications to the three  
6 CBAs, and thus, as a matter of law, the Court must deny their motion.

7 **a) Debtors' proposed deletion of Section 1 of the Local 85 CBA and a**  
8 **similar provision in the Local 324 Palletizers CBA is just a proposal to**  
9 **completely reject the CBAs; it is not a proposal that is necessary to**  
**reorganization**

10 Debtors' proposed modifications of the Local 85 CBA include the deletion of Section 1 of  
11 the Local 85 CBA, which provides that, in part, "[t]he employer recognizes the Union as the sole  
12 bargaining agent for all such employees, excluding but not limited to all office, clerical, sales  
13 personnel, managers, guards, and supervisors as defined under the National Labor Relations Act."  
14 Exhibit 4 to Debtors' § 1113 MPA at 90. The Debtors replaced this section with the phrase  
15 "[b]ased on the employees [sic] desire to have the Union represent them," (unconnected to any  
16 sentence), in section 2 B and also in section 2 E. *Id.*

17 Although Debtors' intent is somewhat obscure, apparently Debtors are proposing no less  
18 than the complete rejection of any collective bargaining at Vitafreze altogether. Under this  
19 modification, Vitafreze would not recognize the Union, and therefore would have no obligation to  
20 bargain with the Union. This is not an *economic* proposal that could be argued as necessary to  
21 reorganization. It is a rejection of the CBA and the Union's position as the employees' bargaining  
22 representative. This is not a legitimate proposal to negotiate from for purposes of § 1113. Non-  
23 economic issues in a proposal will require denial of a motion to reject a CBA. A useful application  
24 of this principle appears in *In re Valley Kitchens, Inc.*, 52 B.R. 493, 495-496 (Bankr. S.D. Ohio  
25 1985), where the court observed on a motion to reject CBA:

26 There were nine subjects dealt with in the proposal given by debtor to the  
27 Union, but of these only four had savings for the debtor directly attributed to  
28 them, that is, subjects dealt with in the proposal to which no saving was  
assigned were overtime, shutdowns, job classification, promotion and  
transfer, and absenteeism and tardiness.

1 Based on this record we have concluded that the requirements of (b)(1) have  
2 not been met. Consequently we cannot authorize rejection of the collective  
bargaining agreement. We go no further in applying the tests of § 1113.

3 A rejection motion likewise was denied because of non-economic issues in the proposal for  
4 modification in *In re William P. Brogna & Co.*, 64 B.R. 390, 392 (Bankr. E.D. Pa. 1986). The  
5 court reviewed the § 1113 proposal under the necessity prong of § 1113(b)(1):

6 The debtor's proposal contains numerous provisions which are non-  
7 economic in nature and which we find and conclude are not necessary to  
8 prevent the liquidation of the debtor. In comparing Debtor's Ex. "H" with  
9 Ex. 690-1, we note that many of the debtor's proposed changes have no  
direct impact on its labor costs and would have no direct bearing on its  
ability to prevent liquidation. For instance, the debtor proposes changes in  
the grievance procedure, union security and apprentice ratios.

10 \* \* \*

11 Therefore, we hold that the debtor has not satisfied the first-prong of the  
12 two-pronged statutory test and, on that basis alone, the debtor's Applications  
to reject these labor contracts must be denied.

13 *Brogna, supra.*

14 Similarly, Debtors proposed removal of Article 1.3 language in the Local 324 Palletizers  
15 CBA stating that employees shall join the Union "as a condition of employment," instead leaving  
16 union membership up to each new worker. Exhibit 5 to Debtors' § 1113 MPA at 123. The  
17 Debtors have provided no justification whatsoever as to why these non-economic modifications are  
18 necessary for reorganization, and thus the Court must reject the § 1113 motion.

19 **b) Debtors have not shown that the proposed wage reductions, health**  
20 **insurance cuts, and elimination of pension contributions are necessary**  
**to reorganization**

21 The Debtors' main argument substantiating the severe reduction of wages is that the union  
22 wages "substantially exceed the median wages paid to similarly situated workers in the same  
23 geographic area." Debtors' § 1113 MPA at 11:20-21. Arguing that union wages are "above  
24 market" and thus need to be reduced pursuant to § 1113, does not address the statutory standard.  
25 Unions are in the "business" of organizing workers to equalize bargaining power between  
26 employees and employers. *See*, 29 U.S.C. § 151. Union wages, by definition, are not determined  
27 by the market alone; they are determined by workers, through their unions, bargaining with and  
28 exerting pressure on their employers.

1 While the above may appear obvious, the Debtors here have not argued that the relevant  
2 union wages are unsustainable for reorganization. Debtors argue that they wish to save money by  
3 paying their employees less because their workers are currently earning more than “market rate.”<sup>16</sup>  
4 This is not the standard. If it were, all Debtors could justify wage cuts simply by contending that  
5 their workers are union members and therefore make more than they otherwise might, absent the  
6 union.

7 Debtors proclaim that “[i]t is clear from the Debtors’ one-year budget that Debtors have no  
8 ability to continue operating if these excessive wages remain in place and modification is required  
9 if there is to be any reorganization.” Debtors’ § 1113 MPA at 11:20-21; Presley Declaration at ¶3.  
10 Debtors neither attached the “one-year budget,”<sup>17</sup> nor explained why such cuts are necessary for  
11 reorganization. Debtors’ conclusory allegations that they need to cut workers’ wages and benefits  
12 are far from sufficient to show, by a preponderance of the evidence, that these modifications are  
13 necessary for reorganization.

14 Similarly, the Debtors argue, without providing any documentation supporting its assertion,  
15 that it has found “quotes of replica insurance coverage” that are much lower than current costs.  
16 Debtors’ § 1113 MPA at 14:26. While Debtors may indeed have found less costly health  
17 insurance, this fact alone does not justify its necessity for reorganization.

18 Debtors then argue that the pension contributions are excessive. Debtors are misleading  
19 this Court; pension contributions cannot be excessive because *Debtors are not contributing*  
20 *anything into either of the Union pension funds*. Exhibit D to Gottesman Decl. 10. As previously  
21 stated, Debtors unilaterally ceased making all pension contributions for union employees, violating  
22 § 1113(f); thus any argument that the pension contributions should be eliminated is moot.

23  
24 <sup>16</sup> Debtors purport to determine the “market rate” by “contacting the Economic Development  
25 Offices for the City and County of Sacramento, and by obtaining data from the website: www.  
26 Onetcenter.org.” Debtors’ § 1113 MPA at 11. The Unions’ counsel has gone to Onetcenter.org and  
27 looked under the “operator” job title. Counsel found that the California median wage for operator  
28 was \$14.48/hour, as opposed to the \$11.94/hour wage cited in Debtors’ brief at 12:4., Exhibit K to  
Gottesman Decl. Even if “market rate” were the standard, this Court should not rely on Debtors’  
unsupported assertions.

<sup>17</sup> At one point Debtors did send the Teamsters Local 324, and not Local 85, a one-page document  
titled “Matterhorn Group, Inc. 12-Month Cash Collateral Budget,” which may or may not be the  
document referenced in the Debtors’ papers.

1 With regard to pension contributions and wage cuts, what Debtors really are seeking from  
2 this Court is retroactive approval for their previous unilateral changes to the CBAs. This is a  
3 corruption of the § 1113 process and should not be tolerated.

4 **c) Debtors have failed to show that maximization of the value of Debtors'**  
5 **business, through rejection of the CBAs, is necessary to reorganization**

6 Debtors argue that, although they allegedly will be forced to liquidate should they not sell  
7 their assets, Debtors need to maximize the value of the assets by rejecting or modifying the CBAs.  
8 As stated above, this position is nonsensical when viewed in conjunction with relevant federal  
9 labor laws regarding successorship. See Section IV(A) above.

10 Furthermore, even if rejection of the CBAs actually would increase the value of the assets,  
11 Debtors have provided nothing to support the contention that rejection of the CBAs is necessary to  
12 reorganization. In fact, Debtors' CEO Nathan Bell has stated under oath that the Debtors have "a  
13 very solid business with a product that's geographically viable," that Mr. Bell has "not seen a  
14 single indication of drop in volume from [their] customers," and that the Debtors' customers have  
15 "remained loyal and stuck with [them]." Exhibit D to Gottesman Decl. at 10-11. In their papers,  
16 the Debtors do not mention other cost-saving methods that exceed the alleged cost-savings of  
17 rejecting the Union CBAs. For example, Debtors estimate that they have lost \$3 million dollars  
18 over the last 18-24 months on selling Crystal Light products, with "the greater portion of that [] in  
19 the last 12 months." *Id.* at 3. According to Mr. Bell, "things have been done to discontinue" the  
20 Crystal Light products, thus saving at least \$1.5 million in losses per year. *Id.* at 5. The Debtors  
21 have also estimated that they've lost at least \$1.25 million/year on a variety pack product for  
22 Costco, which they also plan on discontinuing. *Id.* at 6-7. Thus, from disposing of two  
23 unprofitable products, the Debtors will save at least \$2.75 million/year—more than the entire  
24 projected "monetary burden" of the Local 85 and Local 324 CBAs. See Debtors' 1113 Motion at  
25 22:25; Presley Decl. at ¶ 7; Bell Decl at ¶ 16.

26 **d) Debtors have no justifiable reason for extending the No Strike Clause**

27 Although their papers are not clear, Debtors *apparently* are asking this Court to reject all  
28 three CBAs in their entirety, *with the exception of the no-strike* clauses, which they wish the Court

1 to extend for 10 years—until 2020! This request *was not part of the proposals* Debtors made to the  
2 Unions and which they now are seeking to defend as “necessary.” Therefore, the Unions must  
3 assume that Debtors are asking the Court to make this “modification” to the CBAs. By this  
4 request, Debtors are asking the Court to violate the Union members’ most fundamental labor  
5 rights.

6 At its most basic, a collective bargaining agreement “trades off” terms and conditions of  
7 employment with the contractual relinquishment of every worker’s right to withhold his or her  
8 employment. *See*, 29 U.S.C. § 151 (stating as U.S. policy the encouragement of the practice and  
9 procedure of collective bargaining in order to curtail strikes and other forms of unrest that impair  
10 the free flow of commerce). What Debtors seem to be proposing here is the rejection of the  
11 protections of the CBAs, but that the central power of organized labor—the power to withhold  
12 labor—would be relinquished for ten years.

13 While a No Strike Clause outside the four corners of a CBA would impose an  
14 unenforceable restriction on the Unions (after all, the Unions would no longer be signatory to any  
15 CBAs with the Debtors), the No Strike 10-year-extension request is indicative of Debtors’ blatant  
16 disregard for the procedural and substantive requirements of Section 1113, which require them to  
17 propose *necessary* modifications to the CBAs, bargain in good faith, provide relevant information,  
18 and then, if and only if the Unions reject the modifications without good cause, seek rejection of  
19 the proposals. Debtors have failed on all accounts.

20 4. **Debtors did not provide the Unions with the information necessary to evaluate**  
21 **the proposal**

22 Debtors have provided Local 234 with little information relevant to evaluate the proposal,  
23 and have provided Local 85 with even less. In order to meet its burden of providing the union with  
24 relevant inform

25 ation, the debtor “must provide to the union enough information to justify each of its  
26 proposed modifications.” *In re K & B Mounting, Inc.*, 50 B.R. 460, 467-468 (Bankr. N.D. Ind.  
27 1985).

1 In denying a motion to reject a collective bargaining agreement, the *K & B Mounting* court  
2 found that the debtor should have provided the union "detailed projections and recommendations,  
3 perhaps made by a management consultant, preferably one who is independent of the interested  
4 parties. The debtor should [have] present[ed] full and detailed disclosure of its difficulties and its  
5 proposed short-run and long-run solutions." *Id.* at 467.

6 When debtors are trying to sell assets, as is the case here, the information necessary to  
7 properly evaluate a debtor's proposal includes information about the potential buyers. Courts have  
8 held that "the breadth and depth of the requisite information will vary with the circumstances." *In*  
9 *re Mesaba Aviation, Inc.*, 341 B.R. 693, 714 (Bankr. D. Minn. 2006). In *In re Bruno's*  
10 *Supermarkets* ("*Bruno's Supermarkets*,") LLC, 2009 Bankr. LEXIS 1366 (Bankr. N.D. Ala.  
11 Apr. 27, 2009), the debtor was seeking to sell its stores and reject its collective bargaining  
12 agreements. There the union had significant access to information regarding potential buyers of  
13 the debtor's estate. For example, the debtor provided the union with letters of intent from potential  
14 buyers, *id.* at \*18-21, and provided further communications between potential buyers and the  
15 debtor's agents regarding the terms of the sale and whether the potential buyers were willing to  
16 assume the collective bargaining agreement. *Id.* at \*20-21. The debtor also provided the union the  
17 opportunity to meet with the potential buyers. *Id.* at \* 17-18, 31.

18 Here Debtors merely make the assertion that the collective bargaining agreements must be  
19 rejected to increase the chances of a sale, and has refused to divulge *any* information about  
20 prospective buyers. In order to determine whether the proposed modifications are in fact  
21 "necessary to permit the reorganization of the debtor," the unions must have access to the  
22 information about the potential buyers, as was provided in *Bruno's Supermarkets*.

23 As stated above, a potential buyer who is unconnected to the Debtors will be in a different  
24 position vis-à-vis the Unions than would be a buyer who is an alter ego of the Debtors. The  
25 Unions should be kept "in the loop" regarding any negotiations or information exchanges with  
26 potential buyers so the Unions may evaluate the proposals based on their knowledge of (and  
27

possibly contacts with)<sup>18</sup> those entities. Any conflicts between the Debtors and their creditors (including the Unions) with regard to potential buyers should be aired in the judicial forum—and not kept under wraps as seems to be case here.

5. **Debtors fail to treat creditors, the Debtors, and all affected parties fairly and equitably**

Debtors have not shown that its proposed modifications are in any way fair and equitable. The Debtors bear the burden of proving by a preponderance of the evidence that all creditors, the debtor and all of the affected parties are treated fairly and equitably. *In re Mesaba Aviation, Inc.*, 341 B.R. 693, 749 (Bankr. D. Minn. 2006) (noting that Mesaba "has the burdens of production and persuasion" on the fair and equitable element); *In re Indiana Grocery Co., Inc.*, 136 B.R. 182, 194-95 (Bankr. S.D. Ind. 1990) (holding that, "though necessary, . . . wage reductions must also be fair and equitable" and that debtor "failed to prove that top management and creditors are bearing an equitable burden in [its] reorganization, and thus, that all affected parties are treated fairly and equitably").

Under § 1113, if a debtor fails to show that its shareholders, non-union employees, and creditors make similar sacrifices, courts must not grant rejection. *See, In re Elec. Contracting Servs. Co.*, 305 B.R. 22, 28 (Bankr. D. Colo. 2003) ("A debtor will not be allowed to reject a union contract where it has demanded sacrifices of its union without shareholders, non-union employees and creditors also making sacrifices.").

Here the Debtors have not provided *a shred* of evidence suggesting that management, shareholders, non-union employees, or other interested parties have made *any* sacrifices leading up to Debtors' reorganization. In fact, the opposite is true. While Debtors have unilaterally eliminated contractually obligated pension contributions for all of its union workers, the Debtors have requested that this Court approve salary *increases* to its non-union workers and management.

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<sup>18</sup> It is possible that potential buyers have a pre-existing relationship with the Unions and would prefer a contract be in place. It is possible that potential buyers would prefer the stability and comfort that accompanies labor peace to the uncertainty of strikes and discontented employees. The opposite is possible as well; but the Unions cannot determine whether the Debtors' claims are true without knowledge of the potential buyers.

1 The Debtors ask that this Court grant a \$5000 per month salary increase to Mr. Bell alone, along  
2 with other increases/retention bonuses to members of the Board of Directors, administration  
3 employees, management employees, financial analysts, the controller, the client development &  
4 Sales Operations Manager, the QA Team Leaders, Q & A Technicians, Production Managers, the  
5 Shipping Supervisor, Maintenance Managers, sales employees. See Amended Exhibits 1, 2 to  
6 Debtors' Motion for Authority to Use Cash Collateral Outside the Ordinary Course to Pay Non-  
7 Insider Retention Bonuses and Increases of Insider Compensation, Oct. 5, 2010. The Debtors have  
8 not delayed any payments to their landlords. Exhibit D to Gottesman Decl. at 10. The Debtors are  
9 current on their trade debt (even paying "cash in advance in some cases,") and are current on their  
10 utility bills. *Id.* at 9.

11 Yet, with all this, the Debtors propose to slash union health insurance contributions by 71%  
12 for Bakery Workers Local 85 members and by 70% for Teamsters Local 324 members, eliminate  
13 health insurance completely for seasonal workers, eliminate pension contributions for both unions,  
14 and decrease hourly wages for many workers to the California Minimum Wage. See Debtors'  
15 § 1113 MPA at 8:12-15; Exhibit D to Gottesman Decl. at 10; Exhibit 5 to Debtors' § 1113 MPA at  
16 127, 150 (Under Local 324 Palletizers CBA, the packagers' and palletizers' rate is \$8.00/hour,  
17 under Local 324 Operators' CBA, the packers' proposed rate is \$8.00/hour.).

18 Given that there is no evidence of any burden placed upon any entity *other than union*  
19 *members*, there is just no basis upon which Debtors credibly can claim that the proposed  
20 modifications are "fair and equitable."

21 **6. The Debtors have not met at reasonable times to bargain over each Collective**  
22 **Bargaining Agreement**

23 Debtors have only met once, on September 20, to discuss their proposed modifications to  
24 the Local 85 CBA. Debtors adjourned this meeting without conducting any actual negotiations,  
25 because they stated they were unprepared to address certain issues, including withdrawal liability<sup>19</sup>  
26 and the effect of successor obligations in the event of sale. See Gottesman Decl. Exh. F. As of the  
27

28 <sup>19</sup> Debtors face significant withdrawal liability (around \$4.5 million for Vitafreze alone) if they  
were to withdraw from the Union pension plans. See Exhibit L to Gottesman Decl.



1 date of this filing, Debtors have yet to meet with Local 324 to discuss their proposals, but do have  
2 a meeting planned. Given that Debtors have not met with Local 324 at all, and only have met with  
3 Local 85 once in an abbreviated session, Debtors do not meet this requirement.  
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1           7.     **The Debtors have not bargained in good faith in an attempt to reach mutually**  
2                   **satisfactory modifications**

3           After unilaterally terminating all pension contributions and failing to institute contractually  
4 obligated wage increases, Debtors met only once with Local 85 and has not met at all with  
5 Local 324. As stated above, a Debtor *cannot* be deemed to have bargained in good faith with a  
6 union *after* unilaterally implementing aspects of its proposals prior to bargaining.

7           8.     **The Unions have not rejected any proposals—and certainly have not rejected**  
8                   **proposals without good cause**

9           The Unions have not rejected any proposals. Indeed, Debtors *have met* with the Debtors  
10 only regarding the Local 85 CBA. Debtors ended that meeting after virtually no discussion of the  
11 terms of their proposals, because they decided to seek and consult with labor counsel. *See*  
12 Exhibit F to Gottesman Decl.

13           The Unions have remained ready and willing to negotiate over the economic terms of the  
14 CBAs and proposals, and are willing to make serious concessions over terms that are necessary to  
15 the Debtors' reorganization. Even if the Unions *had* rejected the three proposals, however, there  
16 would have been good cause to do so; the Debtors have not provided information necessary to  
17 evaluate the proposals, the proposed modifications are not necessary for reorganization; some of  
18 the proposed modifications are not even economic at all, and the Debtors have not negotiated in  
19 good faith. Debtors have not met this *American Provision* requirement.

20           9.     **The balance of the equities does not favor rejection**

21           The balance of equities does not clearly favor rejection of the CBAs -- no other conclusion  
22 can be derived from all of the above. *See, e.g., In re Express Freight Lines, Inc.*, 119 B.R. 1006,  
23 1017-1018 (Bankr. E.D.Wis.1990) ("[S]ince . . . the debtor's proposal to reject the collective  
24 bargaining agreement contains modifications that are not necessary to the debtor's reorganization,  
25 the modifications are not fair to all affected parties, and the union rejected the modifications with  
26 good cause, then it follows that the debtor has not met its burden of proof on requirement number  
27 nine; that is, the balance of equities does not favor rejection."). A Collective Bargaining  
28 Agreement is "not an ordinary contract," as the Supreme Court has long recognized. *John Wiley &*

1 *Sons v. Livingston*, 376 U.S. 543, 550 (1964). Among other things, the Collective Bargaining  
2 Agreement provides the guarantee of negotiated terms and conditions of employment. It formally  
3 establishes the role of the Union as a collective bargaining representative in which the workers  
4 have a voice, a vote, and the ability to act in a concerted way regarding their employment. The  
5 CBA provides a grievance procedure and guarantees a method of recourse for discriminatory  
6 treatment by management and protection from being singled out unfairly.

7 Rejection of the CBAs would thus take away more than money – it would take not only  
8 contractual rights but a measure of dignity that the members of the Unions have well earned.  
9 Rejection would undermine the wage scales and benefit levels achieved over many years through  
10 collective bargaining. For all of these reasons, as well, the balance of equities weighs against  
11 rejection of the Collective Bargaining Agreements and Debtors' § 1113 MPA must be denied.

12 **E. MODIFICATION UNDER § 1113(f) IS NOT SIMPLY A JUDICIALLY**  
13 **PROSCRIBED ALTERNATIVE TO REJECTION AS DEBTORS SEEM TO**  
14 **PROPOSE—IF THIS MOTION ACTUALLY REQUESTS MODIFICATION, IT**  
**MUST BE DENIED**

15 Although styled as a Motion to Modify or Reject Collective Bargaining Agreements, and  
16 although Debtors make various statements regarding the modifications they assert are necessary for  
17 reorganization, Debtors conclude with the flat request that the CBAs be rejected. Debtors' § 1113  
18 MPA at 31. The Unions, therefore, are left with a moving target: what relief are the Debtors  
19 seeking? Further, this ambiguity is fatal procedural error: a motion to modify a CBA is evaluated  
20 by a different standard from a motion to reject, and Debtors here apparently have combined the  
21 two motions and ignored the special standard and conditions for modification articulated by  
22 § 1113(e).

23 Further, as an alternative to rejection, Debtors seem to be seeking a judicially determined  
24 set of CBAs, i.e., including the “modifications” they urge are “necessary.” Debtors' counsel seem  
25 to believe that the Bankruptcy Court may choose various items from column A and from column B  
26 and fashion CBAs between the parties pursuant to its *own* judgment—but this is not permitted by  
27 the statute.

28 ///

1           1.     Courts Have the Power to Grant Relief Under § 1113(e) *Only* for the Interim  
2                   Period Between the Scheduling of a Hearing Pursuant to § 1113(b) and the  
3                   Final Relief Granted, if any, under that Section—the Court May Not Grant the  
4                   Permanent or Long-term Modifications Apparently Requested

5           The clear language of § 1113 provides a debtor in possession with steps it must take should  
6           the debtor wish to modify or reject a collective bargaining agreement. Section 1113(e) establishes  
7           procedures for debtors to seek very extraordinary and very limited emergency interim relief from  
8           their CBAs without complying with all of the requirements of Section 1113(c). The Court may not  
9           authorize modifications except for “interim changes” under § 1113(e), for the period of a pending  
10          motion to reject. Section 1113(e) provides, in relevant part:

11                   If during a period when the collective bargaining agreement continues in  
12                   effect, and if essential to the continuation of the debtor's business, or in order  
13                   to avoid irreparable damage to the estate, the court, after notice and a  
14                   hearing, may authorize the trustee to implement interim changes in the  
15                   terms, conditions, wages, benefits, or work rules provided by the collective  
16                   bargaining agreement.

17          The structure of § 1113 is significant. In § 1113(a), Congress specified that its procedures  
18          were exclusive. In subsection (b), the debtor is required to make a proposal, provide information,  
19          and bargain with the union in good faith, in that order, before making a motion to reject. In (c), the  
20          standards for court approval of such a motion are set forth. In (d), the scheduling of a hearing, and  
21          the consequences of non-decision by the court are addressed. Finally, in (e), there is a provision  
22          for temporary, interim relief between the time of the filing of the motion in (b) and the decision on  
23          the motion in (d). It is between these two things that subsection (e) is “interim.”

24          The statute clearly does not contemplate an “interim” relief motion outside of the context of  
25          an ongoing rejection proceeding. In fact, subsection (e) specifically states that “[t]he  
26          implementation of such interim changes shall not render the application for rejection moot.”  
27          Congress here used the definite article (“the application for rejection,” not “any application for  
28          rejection”), signifying that it contemplated a proceeding under subsection (b) must be pending for  
§ 1113(e) to come into play. *See, also, In re Ionosphere Clubs*. 139 B.R. 772 (S.D. N.Y. 1992)  
(vacating order of interim relief in part because no application to reject was pending).

1 A corollary to this proposition is that the Court may order any emergency modifications  
2 under § 1113(e) only until the motion to reject is decided. "Interim relief is available only until the  
3 hearing process is completed—normally within two months, see § 1113(d)(1), (2)." *In re*  
4 *Ionosphere Clubs, Inc.*, 139 B.R. 772, 780 (S.D.N.Y. 1992) (emphasis added). The court thus  
5 concluded that "the structure of the section, the legislative history and the statements off the Court  
6 of Appeals strongly suggest that interim relief granted pursuant to § 1113(e) should be of limited  
7 duration." *Id.* at 780-781.

8 The relief sought under a § 1113(e) motion must be temporary in nature. The Debtors here  
9 apparently seek what is a permanent change of indefinite duration – wage reductions, a retroactive  
10 approval of their cessation of pension contributions, a roll-back in healthcare benefits, and, last but  
11 not least, a 10 year extension of the No Strike Clause. There is no limit upon how long these terms  
12 will last, and indeed, they are merely the reiteration of some of the Debtors' ultimate demands in  
13 bargaining with the addition of the No Strike extension. Section 1113(e) was not intended to grant  
14 this type of relief, which in effect circumvents the entire statute in the guise of an "interim"  
15 measure. If the Unions are reading Debtors' Motion correctly, the relief the Debtors seek is clearly  
16 intended to be "permanent" and "indefinite," not "temporary" and "interim."

17 **2. Debtors Have Not Addressed or Met the "Essential" Standard for Modification**

18 Interim relief granted by a court must be "essential." Therefore, interim modifications to a  
19 collective bargaining agreement must be limited to the bare minimum, short term requirements for  
20 a debtor's immediate survival. *See Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816  
21 F.2d 89 (2d Cir. 1987) (stating, in dicta, that "the 'essential' changes ... must be measured against  
22 whether a debtor will collapse without the change"); *see also Landmark Hotel & Casino, Inc.*,  
23 78 B.R. 575, 584 (9th Cir. B.A.P. 1987) ("In the interim relief context, the court focuses on the  
24 'bare minimum requirements for short-term survival,' which is different from the 'necessary'  
25 changes that will enable the Debtor to complete the reorganization process successfully if the  
26 contracts were fully rejected."); *In re Salt Creek Freightways*, 46 B.R. 347, 349-350 (Bankr. D.  
27 Wyo. 1985) (approving interim changes upon debtor's showing that they were necessary to enable  
28 it to continue in business more than one week without changes). Accordingly, in order to obtain

1 the proposed interim relief, the Debtors must establish that without the interim changes, they will  
2 cease operations and their employees will lose their jobs. *See Salt Creek*, 46 B.R. at 350. Debtors  
3 have not made this showing, so, to the extent Debtors' Motion seeks modification of the CBAs, it  
4 must be denied.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Debtor's § 1113 Motion to reject the CBAs must be denied.

7 Dated: October 18, 2010

8 WEINBERG, ROGER & ROSENFELD  
9 A Professional Corporation

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